

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SHANNON O MURPHY ESQ. SR., doing
business as SHEETMETAL &
ASSOCIATES,

Plaintiff,

v.

U.S. INTERNAL REVENUE SERVICE
TAXPAYER ADVOCATE,

Defendant.

Case No. 1:21-cv-00870-NONE-EPG

FINDINGS AND RECOMMENDATIONS
RECOMMENDING THAT THIS ACTION BE
DISMISSED WITHOUT PREJUDICE FOR
FAILURE TO STATE A CLAIM, FAILURE
TO PROSECUTE, AND FAILURE TO
COMPLY WITH A COURT ORDER

(ECF No. 1)

OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN DAYS

I. BACKGROUND

Plaintiff Shannon O. Murphy Esq. Sr., doing business as Sheetmetal & Associates (“Plaintiff”) is proceeding *pro se* and *in forma pauperis* in this action.

Plaintiff filed a complaint on June 1, 2021. (ECF No. 1.) The complaint sets forth claims against the U.S. Internal Revenue Service Taxpayer Advocate arising out of two phone calls that caused Plaintiff to panic. (*See id.*)

On July 9, 2021, the Court entered an order screening Plaintiff’s complaint and found that it failed to state any cognizable claims. (ECF No. 7.) The Court gave Plaintiff thirty days from the date of service of the order to file an amended complaint or to notify the Court that he wants to stand on his complaint. (*Id.* at 9-10.) The Court warned Plaintiff that “[f]ailure to comply with

1 this order may result in the dismissal of this action.” (*Id.* at 10.)

2 The thirty-day period has expired, and Plaintiff has not filed an amended complaint or
3 otherwise responded to the Court’s order. Accordingly, for the reasons described below, the Court
4 will recommend that Plaintiff’s case be dismissed for failure to state a claim. The Court will also
5 recommend that Plaintiff’s case be dismissed for failure to comply with a court order and failure
6 to prosecute.

7 **II. SCREENING REQUIREMENT**

8 Under 28 U.S.C. § 1915(e)(2), in any case in which a plaintiff is proceeding *in forma*
9 *pauperis*, the Court must conduct a review of the claims brought by the plaintiff to determine
10 whether it “state[s] a claim on which relief may be granted,” is “frivolous or malicious,” or
11 “seek[s] monetary relief against a defendant who is immune from such relief.” If the Court
12 determines that the complaint fails to state a claim on which relief may be granted, it must be
13 dismissed. *Id.* Similarly, if the Court determines the complaint is frivolous or malicious, it must
14 be dismissed. *Id.* An action is deemed to be frivolous if it is “of little weight or importance:
15 having no basis in law or fact” and malicious if it was filed with the “intention or desire to harm
16 another.” *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005). Leave to amend may be granted
17 to the extent that the deficiencies of the complaint can be cured by amendment. *Cato v. United*
States, 70 F.3d 1103, 1106 (9th Cir. 1995).

18 A complaint must contain “a short and plain statement of the claim showing that the
19 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
20 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
21 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
22 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual
23 matter, accepted as true, to ‘state a claim that is plausible on its face.’” *Iqbal*, 556 U.S. at 663
24 (quoting *Twombly*, 550 U.S. at 555). While factual allegations are accepted as true, legal
25 conclusions are not. *Id.* at 678.

26 In determining whether a complaint states an actionable claim, the Court must accept the
27 allegations in the complaint as true, *Hosp. Bldg. Co. v. Trs. of Rex Hospital*, 425 U.S. 738, 740
28 (1976), construe *pro se* pleadings liberally in the light most favorable to the Plaintiff, *Resnick v.*

Hayes, 213 F.3d 443, 447 (9th Cir. 2000), and resolve all doubts in the Plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Pleadings of *pro se* plaintiffs "must be held to less stringent standards than formal pleadings drafted by lawyers." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (holding that *pro se* complaints should continue to be liberally construed after *Iqbal*).

III. SUMMARY OF PLAINTIFF'S COMPLAINT

The complaint alleges as follows:

3. Plaintiff's Mr. Shannon O. Murphy Esq. Sr. while he did remain perform legal business attending his legal advisory and document company named Sheetmetal & Associates, about 5:45 p.m. (PST). was told by IRS. Taxpayer Advocate Hotline agent of named, Ms. Barton, that the IRS relevant computer information system was being up-dated, and that he should call back the following Monday, 01/04/2021, in order apply for at regards the IRS form 911, "Request for Taxpayer Advocate Service Assistance" reply.

4. Mr. Murphy, this case plaintiff's, did in fact call again the Taxpayer Advocate Hotline, at (877) 777-4778, on Monday, 01/04/2021, and was reach IRS agent #1003651022, Mr. White, at about 6:28 p.m. (PST). Mr. White, agent to defendant, did place Mr. Murphy on hold, for he implied was going to be a brief period of time, in order he, Mr. White, attend fair to applications relevant, and could be indicated applied by he alone, regards handling mine request IRS advocate relevant assistance; Mr. White, of case defendant's agents, after about a 15 min. wait, never returned to the telephone call remain at hold jurisdiction, he apply he should return; Plaintiff's Mr. Murphy, was compel a panic – attack, upset VA doctor diagnosed accords relevant Bipolar 1 Disorder, and since so, Mr. Murphy alleges an type assault took place. Consequently before here as was, there must definitely had occur a "breach of contract". 5. Plaintiff's Mr. Murphy, latter, on 01/06/2021, attempted to call again, in order comply a regards complain against the unfair subject Mr. White, did allow for tortnegligence regards occur, since he failed continue at the telephone conversation at fair progress, by he should attempt try contact to Murphy, after telephone conversation was interrupted; Plaintiff's Mr. Murphy, this time was answered by an IRS agent at (877) 777-4778, named Mr. Lopez, agent #1000158053, at about 5:45 p.m. (PST), and was very rudely detoured of fair necessary communications relevant mine asked, requested, required. Plaintiff's Murphy was caused again an panic – attack, that plaintiff alleges, on purpose, to elude, as for Mr. Lopez, be fair apply relevant for continuity remain attend 911 form.

(ECF No. 1 at 2.)

In a section titled "Cause of Action," Plaintiff lists breach of contract, tort-negligence, assault-covert method, and injury/illness. (ECF No. 1 at 2.) Plaintiff requests relief in the form of "[r]elative declares plaintiff Shannon O. Murphy Esq. Sr. dba. Sheetmetal & Associates, an INLC., victor, attends at court case relevant, associate a fair justice concern this U.S. District Court jurisdiction." (*Id.* at 3.) Plaintiff also requests "future court costs, medical support relative

costs, by allow award to plaintiff, for such above mentioned requires a restitution, compensation, \$3,040,000” and “[m]edical billing costs to payment relevant medical facilities, include also relevant VA Clinics used, are of also to be accommodated secure relevant paid up, and to with, for now, to then, and for the future, a medical related issue, for billing be of manifest, occur, that to be paid, at relevant plaintiff’s.” (*Id.*)

IV. FAILURE TO STATE A CLAIM

A. Rule 8

As set forth above, Federal Rule of Civil Procedure 8(a) (“Rule 8(a)”) requires a complaint to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Although a complaint is not required to include detailed factual allegations, it must set forth “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). It must also contain “sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Moreover, Plaintiff must demonstrate that each named defendant personally participated in the deprivation of his rights. *Iqbal*, 556 U.S. at 676-77.

A court may dismiss a complaint for failure to comply with Rule 8(a) if it is “verbose, confusing and conclusory.” *Nevijel v. N. Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981); *Brosnahan v. Caliber Home Loans, Inc.*, 765 F. App’x 173, 174 (9th Cir. 2019). Additionally, a court may dismiss a complaint for failure to comply with Rule 8(a) if it is “argumentative, prolix, replete with redundancy, and largely irrelevant.” *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996).

The Court finds that the complaint violates Rule 8(a). The allegations are confusing and convoluted, making it difficult for the Court to determine what, if any, cognizable claims are included in the complaint. Although the Federal Rules employ a flexible pleading policy, Plaintiff must give fair notice to the defendants and must allege facts that support the elements of the claim plainly and succinctly. It is Plaintiff’s duty to articulate his claims, not the Court’s or the defendant’s duty to try to decipher what claims Plaintiff is asserting in the action.

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1 Because Plaintiff's complaint fails to comply with Rule 8(a), the Court will recommend
2 that it be dismissed.

3 **B. Sovereign Immunity**

4 The United States is immune from suit absent specific statutory consent waiving
5 immunity. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 141-142 (1972); *United*
6 *States v. Shaw*, 309 U.S. 495, 500-501 (1940). Even when suits against the United States are
7 authorized, they may only be brought in designated courts with jurisdiction over the subject
8 matter of the suit. *Shaw*, 309 U.S. at 501. Therefore, before the merits of Plaintiff's claim can be
9 considered, there must be statutory authority which confers subject matter jurisdiction on this
10 Court. Plaintiff must also allege sufficient factual detail to allow the Court to reasonably infer that
11 it has jurisdiction over Plaintiff's claims. *Iqbal*, 556 U.S. at 678; *Moss v. U.S. Secret Service*, 572
12 F.3d 962, 969 (9th Cir. 2009).

13 Here, Plaintiff does not refer to any statute which specifically provides for a suit against
14 the United States for damages. However, construing the allegations liberally, the complaint may
15 be interpreted as asserting common law tort claims under the Federal Tort Claims Act ("FTCA")
16 and a breach of contract claim under the Tucker Act. For the following reasons, the Court finds
17 that Plaintiff fails to state claims upon which relief can be granted under the FTCA or the Tucker
18 Act and recommends dismissal of those claims.

19 **1. Federal Tort Claims Act**

20 The FTCA is a waiver of sovereign immunity that allows a private litigant to bring causes
21 of action for state law torts against the United States and its employees acting in the scope of their
22 employment. 28 U.S.C. § 1346(b). It is the exclusive remedy for damages arising out of the
23 tortious actions of federal employees. 28 U.S.C. § 2679(b)(1). The FTCA provides that the United
24 States shall be liable for tort claims "in the same manner and to the same extent as a private
25 individual under like circumstances." 28 U.S.C. § 2674; *United States v. Olson*, 546 U.S. 43, 46
26 ("[The FTCA] makes the United States liable 'in the same manner and to the same extent as a
27 private individual under like circumstances.'") (emphasis and citation omitted); *United States v.*
28 *Orleans*, 425 U.S. 807, 813 (1976) ("The Federal Tort Claims Act is a limited waiver of
sovereign immunity, making the Federal Government liable to the same extent as a private party

1 for certain torts of federal employees acting within the scope of their employment.”). The United
2 States’ liability under the FTCA is determined using the substantive law of the state in which the
3 allegedly tortious conduct occurred. *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1025 (9th
4 Cir. 2001).

5 Administrative exhaustion is a required element of a claim under the FTCA. *Gillespie v.*
6 *Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980) (“The timely filing of an administrative claim is a
7 jurisdictional prerequisite to the bringing of a suit under the FTCA, and, as such, should be
8 affirmatively alleged in the complaint.”) (internal citation omitted); *Brady v. United States*, 211
9 F.3d 499 (9th Cir. 2000) (stating that a claimant under the FTCA must comply with 28 U.S.C. §
10 2675(a) before a district court can exert jurisdiction over the claim). Specifically:

11 An action shall not be instituted upon a claim against the United States for money
12 damages for injury or loss of property or personal injury or death caused by the
13 negligent or wrongful act or omission of any employee of the Government while
14 acting within the scope of his office or employment, unless the claimant shall have
15 first presented the claim to the appropriate Federal agency and his claim shall have
16 been finally denied by the agency in writing and sent by certified or registered
17 mail. The failure of an agency to make final disposition of a claim within six
18 months after it is filed shall, at the option of the claimant any time thereafter, be
19 deemed a final denial of the claim for purposes of this section.

20 28 U.S.C. § 2675(a). “Because the requirement is jurisdictional, it ‘must be strictly adhered to.
21 This is particularly so since the FTCA waives sovereign immunity. Any such waiver must be
22 strictly construed in favor of the United States.’” *Brady*, 211 F.3d at 502 (quoting *Jerves v.*
23 *United States*, 966 F.2d 517, 521 (9th Cir.1992).

24 Plaintiff appears to be seeking to recover money damages from the United States based on
25 two IRS employees’ allegedly tortious conduct. The FTCA is thus Plaintiff’s exclusive remedy
26 for his tort claims. However, Plaintiff has not alleged facts demonstrating that he complied with
27 the FTCA’s administrative exhaustion requirement. The Court therefore finds that Plaintiff fails
28 to state a cognizable FTCA claim against the United States.

Further, the FTCA does not apply to claims “arising in respect to the assessment or
collection of any tax” are precluded under the FTCA. 28 U.S.C. § 2680(c). Any claims arising out
of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel,

1 slander, misrepresentation, deceit, or interference with contract rights are also excluded. 28
 2 U.S.C. § 2680(h). “[I]f the governmental conduct underlying a claim falls within an exception
 3 outlined in section 2680, the claim is barred, no matter how the tort is characterized.” *DaVinci*
 4 *Aircraft, Inc. v. United States*, 926 F.3d 1117, 1123 (9th Cir. 2019). Therefore, to the extent
 5 Plaintiff’s claims relate to the assessment or collection of any tax or arise out of assault, battery,
 6 misrepresentation, deceit, or any of the exceptions in section 2680, the Court finds that they are
 7 not covered by the FTCA’s waiver of sovereign immunity.¹

8 Finally, as noted above, as noted above, the United States’ liability under the FTCA is
 9 determined using the substantive law of the state in which the allegedly tortious conduct occurred.
 10 In the Cause of Action portion of the complaint, Plaintiff lists “Tort-Negligence”.² (ECF No. 1 at
 11 2.) However, Plaintiff has not alleged where he was located during the events in his complaint or
 12 any other facts describing where the alleged negligence occurred. Assuming the conduct occurred
 13 in California, Plaintiff is required to show a legal duty to use due care, of a breach of that duty,
 14 and of a showing that the breach was the proximate or legal cause of plaintiff’s injury. *United*
 15 *States Liability Insurance Co. v. Haidinger-Hayes, Inc.*, 1 Cal.3d 586, 594 (1970); *see also Delta*
 16 *Savings Bank*, 265 F.3d at 1025 (“To bring a suit under the FTCA based on negligence per se, a
 17 duty must be identified, and this duty cannot spring from federal law. The duty must arise from
 18 state statutory or decisional law, and must impose on the defendants a duty to refrain from
 19 committing the sort of wrong alleged here.”).

20 In this case, construing the allegations liberally, it appears that Plaintiff alleges he was
 21 harmed after an IRS agent, Mr. White, placed him on hold for fifteen minutes and another IRS
 22 agent, Mr. Murphy, was rude to him. (ECF No. 1 at 2.) Plaintiff does not identify any statutory,

23 ¹ The Court notes that Plaintiff alleges that an “assault” took place during his conversations with the IRS employees.
 24 (ECF No. 1 at 2.) Plaintiff also lists a claim for “assault – covert method”. (*Id.*) In support of these claims, Plaintiff
 25 alleges that he was placed on hold during one telephone call with an IRS employee and that another IRS employee
 was rude to him. (*See id.*) Plaintiff does not allege any other facts regarding the alleged assault. As the complaint is
 difficult to decipher, it is unclear whether Plaintiff’s claims arise out of an assault or otherwise falls within one of the
 exceptions enumerated in section 2680.

26 ² In addition to negligence and assault, discussed further above, Plaintiff identifies Breach of Contract and
 27 Injury/Illness as causes of action. (ECF No. 1 at 2.) Plaintiff’s breach of contract claim is addressed further below.
 28 The Court is not aware of any state law causes of action for “Injury/Illness” and it is unclear what claim Plaintiff
 intends to refer to by these terms.

1 decisional, or other law that would give rise to a duty to refrain from committing these acts and
 2 the Court is not aware of any. The Court therefore finds that the complaint fails to state a claim
 3 for negligence.

4 2. The Tucker Act

5 Plaintiff also lists “Breach of Contract” in the “Cause of Action” section of the complaint.
 6 (ECF No. 1 at 2.)

7 The Tucker Act, 28 U.S.C. § 1491, grants the United States Court of Federal Claims
 8 jurisdiction “to render judgment upon any claim against the United States founded upon . . . any
 9 express or implied contract with the United States[.]” 28 U. S .C. § 1491(a)(1). Pursuant to this
 10 statute, the “Court of Federal Claims possesses exclusive jurisdiction of claims arising under the
 11 Tucker Act in excess of \$10,000.” *United States v. Park Place Assocs.*, 563 F.3d 907, 927 (9th
 12 Cir.2009).² As the Ninth Circuit Court of Appeal explains:

13 The Tucker Act supplies both a basis for the exercise of subject matter jurisdiction
 14 and a concomitant waiver of sovereign immunity in the Court of Federal Claims.
 15 This is a package deal-the waiver of sovereign immunity is coextensive with the
 16 jurisdiction the statute confers. The Tucker Act thus never waives sovereign
 17 immunity for suit in, nor confers jurisdiction on, the [district court].

16 *Id.*

17 Here, although the complaint identifies a claim for breach of contract, Plaintiff has not
 18 alleged any facts indicating that a contract existed between Plaintiff and the United States or how
 19 that contract was breached. Notably, Plaintiff requests damages in the amount of \$3,050,00,
 20 which exceeds the \$10,000 benchmark for the Tucker Act. However, Plaintiff does not describe
 21 whether some or all of these damages are attributable to the alleged breach of contract. Thus, the
 22 Court finds that the complaint fails to state a breach of contract claim.

23 **V. FAILURE TO PROSECUTE AND COMPLY WITH A COURT ORDER**

24 “In determining whether to dismiss a[n] [action] for failure to prosecute or failure to
 25 comply with a court order, the Court must weigh the following factors: (1) the public’s interest in
 26 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
 27 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
 28 public policy favoring disposition of cases on their merits.” *Pagtalunan v. Galaza*, 291 F.3d 639,

642 (9th Cir. 2002) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

““The public’s interest in expeditious resolution of litigation always favors dismissal.”” *Id.* (quoting *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly, this factor weighs in favor of dismissal.

As to the Court’s need to manage its docket, “[t]he trial judge is in the best position to determine whether the delay in a particular case interferes with docket management and the public interest.... It is incumbent upon the Court to manage its docket without being subject to routine noncompliance of litigants....” *Pagtalunan*, 291 at 639. Plaintiff has failed to respond to the Court’s screening order. This failure to respond is delaying the case and interfering with docket management. Therefore, the second factor weighs in favor of dismissal.

Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in and of itself to warrant dismissal.” *Id.* at 642 (citing *Yourish*, 191 F.3d at 991). However, “delay inherently increases the risk that witnesses’ memories will fade and evidence will become stale,” *id.* at 643, and it is Plaintiff’s failure to comply with a court order and to prosecute this case that is causing delay. Therefore, the third factor weighs in favor of dismissal.

As for the availability of lesser sanctions, at this stage in the proceedings there is little available to the Court which would constitute a satisfactory lesser sanction while protecting the Court from further unnecessary expenditure of its scarce resources. Considering Plaintiff’s *in forma pauperis* status, monetary sanctions are of little use. And, given the stage of these proceedings, the preclusion of evidence or witnesses is not available.

Although the Court has discretion to recommend dismissal with prejudice, given the lack of information regarding the relevant state court proceedings and the applicability of the above doctrines, the Court will recommend dismissal without prejudice. Accordingly, because the dismissal being considered in this case is without prejudice, the Court is stopping short of using the harshest possible sanction of dismissal with prejudice.

Finally, because public policy favors disposition on the merits, this factor weighs against dismissal. *Id.*

After weighing the factors, the Court finds that dismissal without prejudice is appropriate.

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VI. CONCLUSION AND RECOMMENDATIONS

The Court screened Plaintiff's complaint and found that it failed to state a claim upon which relief may be granted. The Court previously provided Plaintiff with relevant legal standards and leave to amend his complaint to cure these deficiencies. (ECF No. 4.) However, the deadline for Plaintiff to amend his complaint has passed and Plaintiff has not filed an amended complaint, responded to the Court's screening order, or otherwise prosecuted this action. Accordingly, the Court recommends that this action be dismissed without prejudice for failure to state a claim, failure to prosecute, and failure to comply with a court order.

Based on the foregoing, the Court HEREBY RECOMMENDS that:

1. This action be dismissed without prejudice for failure to state a claim, failure to prosecute, and failure to comply with a court order; and
2. The Clerk of Court be directed to assign a district judge for the purpose of closing this case and then to close this case.

These findings and recommendations will be submitted to the United States district judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being served with these findings and recommendations, Plaintiff may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: August 24, 2021

/s/ Eric P. Gray
UNITED STATES MAGISTRATE JUDGE